

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Revision of Part 22 and Part 90 of the)
Commission's Rules to Facilitate Future)
Development of Paging Systems)

WT Docket No. 96-18

Implementation of Section 309(j))
of the Communications Act --)
Competitive Bidding)

PP Docket No. 93-253

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COMMENTS OF MOBILEMEDIA COMMUNICATIONS, INC.

MobileMedia Communications, Inc. ("*MobileMedia*"), the parent company of MobileMedia Paging, Inc. and Mobile Communications Corporation of America ("*MobileComm*"),^{1/} submits these comments on the Commission's proposals adopting area-licensing and auction rules for paging authorizations.^{2/} The wide-area licensing scheme proposed by the Commission does not reflect actual market conditions and, as a result, manufactures mutual exclusivity where none now exists. The current paging licensing plan brings consumers diverse service offerings at competitive prices. In short, the system, for

^{1/} MobileMedia, MobileComm and their subsidiaries comprise the second-largest paging company in the United States, with more than four million units in service. The companies provide service in all 50 states, offering subscribers local, regional and nationwide paging and other wireless messaging services.

^{2/} *In re Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems*, FCC 96-52, released February 9, 1996 (Notice of Proposed Rule Making) ("*Notice*"). MobileMedia has previously filed comments and reply comments in this proceeding concerning the interim licensing proposals of the *Notice*. MobileMedia joined many other businesses and affected parties in calling for an immediate lifting of the application-processing freeze imposed by the *Notice*.

the most part, works. Fixing the problems does not require that the entire plan be recast. Rather, the Commission should, as directed by Congress, use auctions solely to resolve mutually-exclusive applications on a site-oriented basis.

I. INTRODUCTION AND SUMMARY

The FCC has proposed sweeping changes in the process by which it licenses paging frequencies, both in the size of the areas licensed and in the manner in which it will select the licenses from among applicants.^{3/} Unfortunately, these sweeping changes do not take into account the widely varied service areas utilized in the paging industry and, in so failing, turn on head regulatory mechanisms that have served the public well for many years. To be certain, there are processing difficulties to be addressed -- multi-year delays in licensing the 931 MHz band being chief among them. However, the current licensing procedures for paging have fostered the most competitive, customer-oriented communications business now existing. There is no rational basis for discarding a long-used licensing process that has served the public so well in favor of one principally designed to foster the rapid deployment of a new service (which, of course, paging is not).

Although much recent development in paging has centered on nationwide and large-area regional service, such offerings are not the sole services customers demand and

^{3/} See Notice, ¶ 1 ("[W]e propose to transition to a geographic licensing approach where we issue single licenses for geographic areas that encompass many sites, rather than individual licenses on a transmitter-by-transmitter basis. We also propose to adopt competitive bidding rules for mutually exclusive paging applications, so that available channels may be assigned rapidly to applicants who will expedite service to the public.").

expect. Many paging systems provide small-area services -- often centered on single locations, campus-type regions or small communities -- none of which approach in size the area covered by even the smallest Major Trading Area ("MTA"). If the Commission adopts MTA-based licensing, future demand for such small-area services will not be met on an efficient basis, if at all, and user driven growth of current small-area systems will be stymied. Importantly, small systems are often operated by small companies, with population growth and development creating new opportunities for such entrepreneurs. The Commission's auction experience to date shows well that area-based licensing would bring the quick demise of this market segment.^{4/}

As the Commission has acknowledged on many occasions,^{5/} both private

^{4/} See, e.g., G. Naik, *Small Firms Get Tangled in Phone Service Bids*, The Wall Street Journal, p. b-1, col. 3 (March 4, 1996) ("Scores of tiny start-ups had hoped to win a chunk of the new business. But the small-business auction is dominated by eight companies that have placed bids of \$5.8 billion, or 75% of the total \$7.65 billion bid so far.") As of round 48 of the C-Block auction, the top five bids by market ranged from \$320 million to \$857 million. The aggregate bids of the top five "small businesses" ranged from \$566 million to nearly three *billion* dollars. Mom and pop operations these are not. See also "Prices Too Steep for Many Small Companies in 900 MHz Auction," *Land Mobile Radio News* (March 6, 1996) ("Small businesses accounted for more than four in five of the 128 parties eligible to bid when the auction began Dec. 5. But just 90 eligible bidders remained in round 66 on Feb. 28, after many small businesses dropped out . . . 'If you happen to be bidding on a block that fits within one of these larger company's strategies, those companies can step up and bid almost whatever they want,' said one auction participant.").

^{5/} See Notice, ¶ 41 (where the Commission cites "the mature nature of the industry and the large number of existing systems" as reasons for proposing short three- and five-year periods for new geographic licensees to meet coverage requirements); see also *Amendment of the Commission's Rules to Provide Channel Exclusivity to Qualified Private Paging Systems at 929-930 MHz*, 8 FCC Rcd 8318, 8319 (1993) (the "PCP Exclusivity Order") ("[P]aging companies have occupied much of the available spectrum on common carrier paging channels and on private paging channels below
(continued...)

carrier paging ("PCP") and common carrier paging ("CCP") are mature services with little desirable spectrum left to be licensed. Thus, in contrast to PCS, cellular, SMR and IVDS,^{6/} there is no developmental purpose to be served by area licensing for paging. Moreover, with the exception of the 931 MHz band, the Commission has experienced no material licensing issues as a result of mutually-exclusive applications.^{7/} In the absence of such mutual exclusivity, the Commission lacks statutory authority to conduct auctions.^{8/} At bottom, the regulatory scheme proposed in the *Notice* -- MTA-based area licensing that seems almost designed to assure mutually-exclusive applications -- simply does not match the market facts: most paging customers look for service in areas much smaller than MTAs; the continued development of paging is not dependent on area licensing; and there are few cases of mutual exclusivity issues outside the 931 MHz band.

MobileMedia respectfully urges the Commission to retain its time-tested site-based licensing approach, using auctions solely to resolve mutually-exclusive applications in the 931 MHz band (using a site-oriented approach as discussed below). Alternatively, if the Commission believes an area-based licensing scheme is necessary for reasons it has not yet articulated, it should look to Basic Trading Areas ("BTAs") or smaller market-oriented

^{5/}(...continued)

900 MHz. Historically, 929-930 MHz has been less heavily used than other paging bands. Nevertheless, demand for these frequencies has increased as alternative spectrum grows scarce.").

^{6/} PCS, SMR and IVDS are acronyms for, respectively, Personal Communications Service, Specialized Mobile Radio (Service), and Interactive Video Data Service.

^{7/} See *infra* p. 12.

^{8/} See *infra* pp. 15-17.

regions to define the license areas. Such smaller regions will more accurately reflect the scope of local paging service and retain opportunities for small businesses. Moreover, if area-based licensing is adopted, the Commission should award area licenses without competitive bidding to any existing licensee that provides coverage to 70% or more of the population in the license area. This will prevent anti-competitive bidding practices and limit pricing distortion caused by bid parking. For the same reasons, the Commission should adopt market-by-market stopping rules for any area license auctions and should, in the case of any paging auctions, adopt rules that permit systems trading activity during the auctions.

Before considering any of the policy issues noted above or raised in the *Notice*, the Commission must end its broad freeze on accepting and processing paging applications. The freeze harms consumers and hampers the industry at the very moment it must prepare to face new competitive challenges. Although various interim relief has been suggested by commenters in this proceeding, *any* freeze is inappropriate until such time as the Commission determines whether and where changes are appropriate in the existing licensing process for paging.

II. GEOGRAPHIC LICENSING IS A SOLUTION IN SEARCH OF A PROBLEM

A. **Paging is a Fiercely Competitive, Mature Business With Systems Providing Service to Areas Ranging in Size From City Blocks to Nationwide.**

Although the record in this proceeding and others already establishes that the paging industry is highly competitive,^{9/} the facts bear repeating: "At present, more than 600 licensed paging operators compete for business, offering customers a wide array of options in terms of coverage area, transmission quality, system reliability, and price." *Notice*, at ¶ 7. At least ten facilities-based carriers are licensed to offer nationwide messaging service^{10/} and most major metropolitan areas receive service from at least twelve such carriers.^{11/} The industry, under the present licensing plan, has kept pace with ever-increasing demands for service, deploying service in the 929 and 931 MHz bands to most of

^{9/} *Notice*, ¶¶ 6-7. See, e.g., Comments of the Personal Communications Industry Association on Interim Licensing Procedures, WT Docket No. 96-18, PP Docket No. 93-253, at 7-9 (filed March 1, 1996) ("*PCIA Comments*"), citing *Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1468 (1994) (Second Report and Order) ("*CMRS Second Report and Order*"); *Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 10 FCC Rcd 8844, 8867-68 (1995) (First Report) ("*1995 CMRS Competition Annual Report*").

^{10/} The nationwide facilities-based carriers are MobileComm, Mobile Telecommunications Technologies Corp., Motorola, Paging Network Inc., PageMart Inc., American Paging Inc., Metrocall Inc., Airtouch Communications Inc., Arch Communications Group Inc., and MAP Mobile Communications Inc.

^{11/} *1995 CMRS Competition Annual Report*, 10 FCC Rcd at 8854.

the nation in little more than ten years. Despite substantial capital outlays for such expansion, subscriber costs have fallen year after year.^{12/}

Growth has been so intense that, as the *Notice* acknowledges, there is relatively little desirable spectrum that remains for licensing in the CCP or non-shared PCP bands.^{13/} While opportunities for new specialized and local services remain (together with the unique opportunities for small business), there remain very few opportunities to create wide-area or nationwide systems using a single frequency.

Although nationwide and large regional services have attracted substantial attention in recent years, such offerings do not define the scope of paging service that the public demands. Wide-area service can be comparatively inefficient and, in many cases, far exceeds the needs of users. Internal paging systems often provide life-critical, dedicated service to areas only a few city blocks in size. Multi-customer systems provide low-cost messaging over limited coverage areas to small towns across the country. The operators of these small systems (and their users) count on the flexibility afforded by the present licensing system to add service where and as needed. Area licensing will eliminate this flexibility and, as a practical matter, preclude these services.

^{12/} See "As Paging Prices Keep Declining, Subscriber Numbers Increase," *Land Mobile Radio News*, July 1, 1994 ("'Falling prices for equipment and service all play a key role in paging's increasing popularity among businesses and consumer segments,' according to [the Malarkey-Taylor Associates, Inc./Economic and Management Consultants International Inc.'s 1994 report]."); *1995 CMRS Competition Annual Report*, 10 FCC Rcd at 8855 ("Charges for local paging service usually consist of a flat monthly fee, averaging between \$9 and \$17, depending on the number of features and functions the customer desires.").

^{13/} *Notice*, ¶¶ 13, 18.

B. The Condition Of The Paging Market -- Mature, Highly Competitive, With Service Areas of Widely Varied Size -- Stands in Sharp Contrast To the Condition of Other Services Where Area Licensing Has Been Implemented.

The Commission's *Notice* cites the deployment of geographic licensing schemes in other areas such as PCS and SMR service as well as administrative reasons in recommending wide-area licensing for paging.^{14/} However, the paging industry is vastly different from these services, and the administrative benefits are illusory.

Foremost among the differences between paging and other services is the widely-varied areas served by paging systems using the same basic spectrum. For example, the Washington, D.C. metropolitan area is populated with 929 MHz band PCP operations that are part of systems serving (i) hospitals, (ii) college campuses, (iii) the Washington metropolitan area, (iv) the mid-Atlantic region, (v) the eastern United States, and (vi) the entire country. Conversely, PCS and SMR operators (along with cellular, IVDS and wireless cable operators) generally seek to serve the same areas as other operators in their markets. This market fact is the result of both cost structures and the unique role played by paging. Paging systems are comparatively inexpensive and have long been used to provide dedicated communications service to discrete user groups. While the *Notice* asserts that the paging industry has, "evolved away from single-site systems towards multi-site systems that cover large geographic areas,"^{15/} numerous paging providers offer services based on local

^{14/} *Id.* at ¶¶ 19-21.

^{15/} *Id.* at ¶ 21.

systems comprising only a few sites. Of course, under the present regulatory framework, larger networks have developed and can continue to develop.

The Commission must recognize that paging meets different needs for different users. Internal systems are often established to serve time-critical needs in healthcare and campus security. Local systems users often choose paging over services such as cellular or PCS precisely because of paging's capability of immediate one-way communication to individuals within a limited area. Individuals, such as doctors, messengers, delivery people, and trades persons, who are in need of constant communication with a "home base" are hampered or over-served by higher bandwidth products.

Paging is also distinguishable in that it is a mature, highly competitive business. This was not so for cellular or PCS when area exclusivity was chosen for these services. Nor was it true for SMR when area licensing was adopted to revitalize that existing service. The Commission chose area exclusivity for cellular to assure the commercial viability of a new service.^{16/} Similar concerns, including concern about the ability to compete with cellular, were cited in choosing area licensing for broad-band PCS. And, in revamping the licensing scheme for SMR services, the Commission cited a need to enable SMR to compete effectively with cellular and PCS as a reason for selecting large

^{16/} See *An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems*, 78 FCC 2d 984 (Notice of Inquiry and Notice of Proposed Rulemaking) (1980); 86 FCC 2d 469 (Report and Order) (1981).

service areas as suitable for auctions.^{17/} Paging is not new, and it does not need a licensing upheaval to compete with cellular, PCS or SMR. Paging targets a unique consumer base that does not precisely overlap the base of any of these services. Instead, paging is a complement to two-way voice service and has been helped, rather than hurt, by the introduction of such services.^{18/} Indeed, paging has enjoyed its most dramatic growth over the past ten years, during the period in which cellular has been introduced to the American public.^{19/} There is absolutely no need to mimic two-way regulatory structures to assure continued growth and vitality for paging.^{20/}

Paging is likewise distinguishable from wireless cable. Though wireless cable was regarded as a heavily encumbered service when area licensing was adopted, the health and success of the wireless cable industry is hardly comparable to that of paging. Indeed, wireless cable was long plagued by a volume of mutually-exclusive applications that thwarted growth across the board. The Commission chose area licensing to assure prompt resolution

^{17/} See *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, Third Report and Order, 9 FCC Rcd 7988, 8044 (1994).

^{18/} See *1995 CMRS Competition Annual Report*, 10 FCC Rcd at 8853 n.53 ("[A]pproximately 31 percent of cellular customers also use paging service.").

^{19/} See "Looking for Growth, Paging Companies Eye PCS Opportunities," *Advanced Wireless Communications* (June 22, 1994); see also "Paging Dick Tracy", *HFN* (January 1, 1996) (stating that paging has grown from just one million pagers in 1980, to nearly 10 million in 1990, and to 24.5 million in 1994).

^{20/} Unlike SMR, paging does not require large numbers of contiguous channels within one area for a provider to offer service. Thus, under any auctioning scheme, channels should be auctioned independently rather than in blocks. See *infra*, p. 23. Auctioning blocks of channels merely creates mutual exclusivity problems where none currently exist.

of the problem and the development of competition to wired cable systems.^{21/} None of these factors exists in paging. Although mutually exclusive applications in 931 MHz band present an issue, it is not one that threatens the industry as a whole. Nor can area licensing be expected to accelerate the already rapid growth of paging.

Although the Commission, in the *Notice*, alludes to a goal of "enhanc[ing] regulatory symmetry between paging and narrowband PCS,"^{22/} it sets forth no basis for this goal and there is no otherwise apparent reason to treat the services identically. Licenses for narrowband PCS were awarded on unlicensed spectrum; the Commission confronts heavily-encumbered spectrum in the paging industry. Narrowband PCS is a two-way service offering capabilities beyond that of paging. It is a service targeted at higher-end users who are likely to demand wide-area coverage; as noted above, paging serves local needs of hospitals, messenger services, and local businesses which do not always require such wide-area capability.

Finally, the Commission cannot justify its creation of geographic licensing areas based upon administrative efficiency.^{23/} Were one starting with unencumbered spectrum as in the case of narrowband PCS, there is no question that area licensing would offer some administrative benefits. That is not the case here. No matter which licensing

^{21/} See *in re Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, 78 RR 2d 856, 871 (1995).

^{22/} *Notice*, ¶ 21.

^{23/} See *id.* at ¶ 19 (citing the "greater ease of administration" which geographic licensing will bring to the paging industry).

system is used for paging, both the Commission and paging licensees will be forced to deal with grandfathered systems as the industry moves forward. And there is nothing to preclude the Commission from adopting additional rules to permit an efficient system of notification-based construction of additional paging stations within the confines of existing protected contours. Area licensing is not necessary to achieve these benefits. To the extent site-based licensing imposes additional burdens upon the Commission, those costs are fully funded by regulatory, application and other fees charged by the Commission to paging licensees.

Paging is different from other services where area licensing has been adopted in many important ways, and there is no reason to suppose that what worked for those services will work for paging. Indeed, imposing an area-based licensing scheme will bring an end to many important services without any offsetting public interest benefit.

C. The Principal Result Of Wide-Area Licensing Would Be The Creation Of Mutual Exclusivity Where None Now Exists.

As the Commission explains in the *Notice*, the current licensing system for paging has recently seen mutually-exclusive ("MX") applications only in the 931 MHz band.^{24/} While these results are due in part to congestion and the Commission's licensing process, the absence of conflicts is also a product of the comparatively limited geographic scope of current applications. Whereas two operators can now propose service using the same frequency at sites only 70 miles apart in the 929 MHz band, an MTA-based area licensing scheme would make those applications mutually exclusive if they were for sites 250

^{24/} Compare *Notice*, ¶ 13 (current licensing on CCP VHF and UHF channels is "confined largely to the addition of fill-in sites and minor expansion by existing licenses"); compare also *Notice*, ¶¶ 15-16.

miles apart in the same MTA. Similarly, whereas mutually-exclusive applications have been avoided for 929 MHz-band exclusive channels as a result of the first-come, first-served policy, the MTA proposal would create mutual exclusivity by establishing a filing window. There is no rational policy basis to justify the artificial creation of mutual exclusivity in these circumstances.

D. Auctions Can Be Used to Resolve Mutual Exclusivity Problems Within the Present Site-Based Licensing Plan.

As discussed above, mutual exclusivity problems now arise for paging only in the 931 MHz band. These conflicts can and should be resolved using auctions within its current site-based regulatory framework.^{25/} The Commission should proceed as follows: All applicants with current 931 MHz band applications identified as blocked in the most recent automated grant processing^{26/} and those that have not yet appeared on Public Notice should be afforded a thirty-day window to specify an operating frequency.^{27/} To the extent such specification creates non-mutually-exclusive applications, those applications should be processed to grant; to the extent mutually-exclusive applications still exist, the Commission

^{25/} As is also discussed above, mutual exclusivity issues outside the 931 MHz band are highly unlikely. However, to the extent they might arise, the solution proposed here for the 931 MHz band will serve to resolve them without reliance on wide-area licensing.

^{26/} See *FCC Public Notice*, FCC Completes First Run of its New Software for the Processing of 931 MHz Paging Applications, DA 96-219 (released February 22, 1996).

^{27/} MobileMedia first made this proposal in this proceeding in its Interim Licensing Proposal Reply Comments. See Reply Comments of MobileMedia Communications, Inc. on Interim Licensing Proposals, at p.19 (filed March 11, 1996) ("*MobileMedia Reply Comments*").

can use automated processing to identify distinct groups of mutually exclusive applications. The Commission should then conduct an auction among the applicants for the area encompassed by each application group. The application of the high bidder would be granted, and the high bidder would hold an exclusive right, for a period of time, to apply for additional facilities within the area. The exclusivity right would be partitionable. All of the area that was unserved at the end of the exclusivity period would become available for first-come, first-served licensing as is now applied in the 929 MHz band. On a going-forward basis, the Commission should implement for the 931 MHz band the same rules now in place for the 929 MHz band exclusive channels.^{28/} Proceeding in this fashion would use the Commission's auction authority as it was intended to be used rather than as a means to raise revenue.

E. Area Licensing is the Wrong Processing Tool for Paging.

The Commission's geographic licensing proposal would create a communications universe of one-way and two-way data and voice wireless services, all of which would be licensed by wide geographic areas. Instead of striving for the nebulous goal of administrative efficiency in designing a geographic licensing scheme, the Commission should adhere to its goal of aiding the differentiation of communications services. The realm of available services now includes numerous services with different capabilities offered at varied prices to different types of consumers. Paging currently serves numerous local

^{28/} See *PCP Exclusivity Order*, at 8330-31. To the extent mutually-exclusive applications arise under these rules (presumably as the result of simultaneous filings), auctions conducted in the manner suggested for the currently mutually-exclusive 931 MHz-band applications should be utilized.

markets across the country which are smaller than the size of either an MTA or a BTA. If the Commission focuses on the efficiency of regulations built around the symmetry of licensing by wide geographic areas, it will inevitably sacrifice that portion of the industry, including localized paging, which serve smaller areas inexpensively.

III. THE COMMISSION'S AUCTION AUTHORITY EXTENDS ONLY TO MUTUALLY-EXCLUSIVE APPLICATIONS; THE AUCTION END ALONE CANNOT JUSTIFY THE WIDE-AREA LICENSING MEANS

The Commission's authorization to conduct auctions extends only to licenses for which mutual exclusivity of applications exists; indeed, the statute authorizing the FCC's use of competitive bidding begins, "[i]f mutually exclusive applications are accepted for filing for any initial license or construction permit . . ."^{29/} The Commission has recognized that its authority to conduct auctions extends only to solving mutual exclusivity problems.^{30/} Furthermore, the D.C. Circuit Court of Appeals has just recently recognized this principal as well. In its March 8 decision regarding the narrowband PCS license of Mobile Telecommunications Technologies Corp. ("*MTel*") granted pursuant to a pioneer's preference, the court stated that the license granted to MTel was properly exempted from

^{29/} 47 U.S.C. § 309(j)(1); *see* H.R. Rep. No. 103-111 at 253 ("The authority [to use competitive bidding] would apply only when there are mutually exclusive applications for an initial license for a use described in subsection 309(j)(2) . . . Competitive bidding would not be permitted to be used for unlicensed uses; *in situations where there is only one application for a license*, or in the case of for a renewal or modification of the license.").

^{30/} *See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding* (Second Report and Order), 9 FCC Rcd 2348, 2350 (1994) ("*Auction Second Report and Order*").

auctions even after the amendment of the Communications Act authorizing auctions, for such auction-authority only applied to solving the problem of competing applications and MTel's application had already been granted a "preference" vis-a-vis other applicants by virtue of its innovative technological design.^{31/} In the paging arena, mutually-exclusive applications have arisen in few cases outside of 931 MHz frequencies under the Commission's current site-by-site licensing scheme. In the 929 MHz band, licensees either share frequencies or are awarded licenses on a first-come, first-served basis and only if they satisfy explicit criteria for "exclusiveness"; this system so far has yielded no "MX" problem in the 929 MHz band.^{32/}

The Commission's proposal to issue paging licenses by geographic areas, rather than by site, thus manufactures a mutual-exclusivity problem where little existed before and thus invents a need for auctions in all such wide geographic areas. The Commission's introduction of geographic licensing in the 929 MHz band and especially its proposal to select MTAs as the appropriate-sized areas to be auctioned, represents a giant and virtually unexplained leap from its earlier intention to, "not depart from existing first-come, first-served practices which work to avoid mutual exclusivity."^{33/} Furthermore, the

^{31/} *Mobile Communications Corp. of America v. FCC*, 1996 U.S. App. LEXIS 3976, at *3-4 (D.C. Cir. March 8, 1996).

^{32/} The Commission has proposed auctions to resolve any mutually-exclusive applications in the 929 MHz exclusive band. *PCP Exclusivity Order* at 8331. Although the processing rules make mutual exclusivity unlikely (conflicting applications can arise only if filed with PCIA at the same time), in the event it arises, applications should be handled in the same manner MobileMedia has suggested for current mutually-exclusive applications in the 931 MHz band. See *infra* pp. 13-14.

^{33/} *Auction Second Report and Order* at 2351.

leap from site-by-site licensing to auctioning MTAs appears both to breach the Commission's obligation to avoid mutual exclusivity where possible and to constitute a use of its newly-granted auction authority as an excuse to disrupt its present spectrum-allocation scheme.^{34/}

While granting the Commission some authority to construct new licensing areas which may require competitive bidding, the auction-authorizing legislation hardly grants the Commission *carte blanche* to disrupt an existing regulatory scheme where little MX problem exists and to replace such system with an entirely different scheme. The Commission should continue issuing paging licenses on a site-by-site basis; an introduction of competitive bidding within such scheme could be limited to only those areas in which it faces an MX problem.^{35/}

IV. WIDE-AREA LICENSING WILL ELIMINATE OPPORTUNITIES FOR SMALL BUSINESS.

Implementing wide-area licensing will cut off opportunities for small businesses. The Commission itself seems to recognize this by suggesting bidding credits for small business as part of the auction process.^{36/} As now licensed, local paging need not be capital-intensive and thus is unique among the communications services in being open to small businesses. The Commission's proposal to introduce a geographic licensing scheme will affect the ability of numerous applicants otherwise financially able to construct smaller

^{34/} See 47 U.S.C. §309(j)(6)(A),(E).

^{35/} See *supra*, part II(D).

^{36/} Notice, ¶¶ 125-131.

paging systems (and perhaps financially able to win auctions of licenses for smaller areas) to obtain licenses at all.

The legislation authorizing the use of competitive bidding instructs the Commission to promote the objective of, "disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."^{37/} By introducing auctions through a geographic licensing scheme, though, the Commission will in fact reduce the opportunities for such a "wide variety of applicants" to enter the paging industry. The geographic licensing scheme would alter the regulatory environment to create a more capital-intensive industry which, bidding credits or not, would exclude many existing and new small businesses from acquiring licenses. In light of Congress' express desire for the Commission to obtain a diverse spectrum of licensees, the FCC's proposed geographic licensing scheme for paging is a flawed one which would transform an industry in which small businesses currently can compete into one in which they may not be able even to obtain appropriate licenses for their businesses.

While the Commission has proposed to preserve opportunities for small business through the use of bidding credits, past experience shows beneficiaries of such credits are seldom truly small businesses. In any event, the Commission's proposal here borders on the absurd: licensing is imposed with no apparent public interest benefits on a mature, competitive industry using highly-encumbered spectrum. Because wide-area service

^{37/} Omnibus Budget Reconciliation Act of 1993, Pub. L. N. 103-66, Title VI, § 6002 (47 U.S.C. § 309(j)(3)(B)).

raises capital requirements, small businesses are no longer able to compete. Area licensing creates the very problem that is then ill-fixed by a flawed bidding credit scheme.

V. IF ADOPTED, GEOGRAPHIC LICENSING SHOULD BE BASED ON BTAs OR SOME SMALLER MARKET-BASED GEOGRAPHIC REGION

The *Notice* tentatively concludes that, "MTAs form the most appropriate geographic boundaries for paging systems [because these areas] best mirror the size and development of existing paging systems."^{38/} The premise is inaccurate. While it is true that MTAs resemble the service areas of some regional paging systems that likely carry a high percentage of the nation's paging traffic, MTAs do not match the service areas of the majority of paging *systems* now licensed in the country.^{39/} The service areas of local paging systems in many communities are dwarfed by the MTA's that contain them. MTA's cover territories stretching hundreds of miles that include, by definition, multiple individual market areas.^{40/} Though wide-area coverage is a goal of numerous paging customers, such

^{38/} *Notice*, ¶ 34.

^{39/} For example, the data released in connection with the completion of the most recent 931 MHz band automated processing shows that, in the 931 MHz band alone, approximately 350 of 450 licensees hold authorizations for less than twenty paging sites.

^{40/} See *Rand McNally Commercial Atlas and Marketing Guide* at 36 (1996). An MTA includes two or more Basic Trading Areas (a "BTA"). A BTA is defined as an independent market area.

coverage appeals to only a minority of present customers; today, only about five percent of total users demand nationwide service.^{41/}

The paging industry includes numerous companies which aim to develop smaller systems facilitating contact between people within fifty or one-hundred miles of one another (a one- to two-hour driving distance). Licensing by MTAs precludes the ability of businesses to garner licenses at this local level; and, as discussed above, precludes the licensing of private paging systems that provide service to health care facilities, schools, campuses and similar areas where the instant communication assured by small systems can be critical. While permitting partitioning of MTA licenses may alleviate some of the problem,^{42/} it is unlikely to facilitate the private, small-area systems described above and, in any event, is likely to divert potential auction revenue to private parties. Thus, the FCC's MTA-based scheme imposes both a hurdle to the establishment of local paging systems where none currently exists and creates the opportunity for profit-making by speculators.

It is well-established that the marketplace does not demand wide-area coverage for all paging services; indeed, there is a demand for service to unique, non-market-oriented areas. If it adopts a geographic licensing scheme for any paging bands, the Commission should select BTAs (or some market-based geographic region of smaller size), rather than MTAs, as the basis for licensing. BTAs more closely match the size of current paging areas

^{41/} See "Will SkyTel 2-Way Prove Out or Is It a Few Years Ahead of its Time," *Wireless Business and Finance* (February 28, 1996) (quoting two BT Securities analysts).

^{42/} See Notice, ¶ 138 (Commission invites comment on whether it should expand the partitioning concept from just rural telephone companies, "to other designated entities or to all paging licensees in general.").

(though they are larger than many) and, though still precluding many small systems, will provide more flexibility than MTAs. For the same reason, selection of BTAs, or smaller areas, will preserve opportunities for small businesses.

VI. IF AREA LICENSING IS ADOPTED FOR ANY PAGING BANDS, THE COMMISSION SHOULD RECOGNIZE AS AREA LICENSEES THOSE OPERATORS THAT NOW PROVIDE SERVICE TO SUBSTANTIALLY ALL OF THE AREA

Although MobileMedia does not believe that area licensing is appropriate for paging, to the extent a plan is adopted, it should include provisions that account for existing operations already serving the newly-defined areas. Specifically, operators that provide service to seventy percent or more of the population of the area encompassed in a newly-defined area should be awarded a license for that area. Licenses for areas not so served would be subject to auction. This approach will serve the public interest by assuring that existing operators that do provide area service will have the ability to complete natural expansion plans (to the extent the area definitions adopted are accurate). Moreover, it would help avoid greenmail and other anticompetitive activities.

VII. BOTH MTEL'S AND MOBILEMEDIA'S *DE FACTO* NATIONWIDE 931 MHZ BAND CHANNELS SHOULD BE EXEMPT FROM ANY AUCTION SCHEME

Like MTel, MobileMedia operates *de facto* nationwide 931 MHz band channels which augment a designated 931 MHz band nationwide frequency. As MobileMedia has previously shown in more detail,^{43/} its 931.8125 MHz channels

^{43/} See *MobileMedia Reply Comments*, at p. 7.

complement its designated nationwide channel of 931.8875 MHz. MobileMedia is licensed for nearly 1,000 transmitters on 931.8625 MHz and nearly 800 on 931.8125 MHz, all in the top 200 markets.^{44/} Without even taking into consideration operations outside the top 200 markets, this exceeds by a substantial margin the approximately 700 transmitters MTel states that it operates in on its *de facto* nationwide channel.^{45/} Moreover, MobileMedia holds authorizations for 180 of the top 200 markets on 931.8625 MHz and 130 of them on 931.8125 MHz.^{46/} By any reasonable measure, MobileMedia's channels are both "nationwide" just as is MTel's, and those operations augment existing nationwide 931 MHz band authorizations.^{47/} Similarly situated licensees must be treated in a similar manner.^{48/} Accordingly, the FCC should exempt MobileMedia's *de facto* nationwide channels from the licensing proposal.

^{44/} *Id.* (citing a study of the top 200 markets conducted by Arthur K. Peters Consulting Engineers).

^{45/} MTel did not indicate the scope of its license analysis although it appears to include each of the 733 cellular MSAs and RSAs. MobileMedia's study covered only the top 200 markets.

^{46/} *MobileMedia Reply Comments*, at p. 8 (citing a study of the top 200 markets conducted by Arthur K. Peters Consulting Engineers).

^{47/} Indeed, as noted in MobileMedia's Reply Comments, its *de facto* 931 nationwide operations more closely mirror its existing 931 nationwide operations than do MTel's. *MobileMedia Reply Comments*, at p. 10.

^{48/} The FCC has preempted local regulation of MTel's *de facto* nationwide channel is not a rational distinction between such channel and MobileMedia's *de facto* nationwide channels; each company's subscribers harbor the same expectations of nationwide coverage. Furthermore, as a result of the Omnibus Budget Reconciliation Act of 1993, this preemption of state regulation is now the law; thus, there should be no differential treatment of MobileMedia's and MTel's channels on this basis. *See* 47 U.S.C. §332(c)(3).